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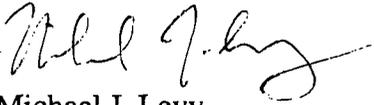
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TO: Paul Lillebo
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FROM: 
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DATE: January 28, 2002

SUBJECT: THE EXTENT TO WHICH TMDLS ARE SUBJECT TO THE ALASKA RULE

INTRODUCTION

This memorandum is intended to clarify which items in a Regional Water Quality Control Plan (Basin Plan) amendment that implements a total maximum daily load (TMDL) require prior approval by the United States Environmental Protective Agency (EPA) pursuant to the Alaska Rule. In summary:

- The Alaska Rule requires states to obtain EPA's prior approval before new or amended water quality standards become effective. Water quality standards include beneficial uses, water quality objectives, an antidegradation policy, and certain policies that generally affect the implementation of the aforesaid.
- The Alaska Rule does not apply to other items, even though they may require EPA's approval. TMDLs fall outside the Alaska Rule. TMDLs become effective under California law when promulgated, even if EPA ultimately disapproves them.
- Where a TMDL, however, creates or revises a water quality standard, the standard itself (not the entire TMDL) is subject to the Alaska Rule.
- Non-standards parts of a TMDL are valid and enforceable immediately upon promulgation by California.

DISCUSSION

California Environmental Protection Agency

A. The Alaska Rule Only Applies To Water Quality Standards

Historically, EPA's water quality standards regulations allowed standards to go into effect, for Clean Water Act (CWA) purposes, as soon as they were adopted and effective under state law, and to remain in effect unless and until replaced by another standard. (65 Fed.Reg. 24641, 24642.) On July 8, 1997, the United States District Court held in the matter of *Alaska Clean Water Act Alliance v. Clark* (W.D. Wash.) #C96-1762R, that the plain meaning of the CWA required that new and revised standards were not effective until approved by EPA. (*Id.*) Section 303(c)(3) states in pertinent part:

If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State.¹ (22 U.S.C. § 1313(c)(3) (emphasis added).)

Accordingly, the court found that standards do not become effective until after EPA approves the standard.

Following this decision, the parties agreed to a settlement whereby EPA would amend the federal regulations relating to adoption and revision of water quality standards. This Amendment, dubbed the Alaska Rule, appears at 40 Code of Federal Regulations section 131.21(c) through (f). The Alaska Rule states:

If a State or authorized Tribe adopts a water quality standard that goes into effect under State or Tribal law on or after May 30, 2000[, t]hen once EPA approves that water quality standard, it becomes the applicable water quality standard for purposes of the [Clean Water] Act[, u]nless or until EPA has promulgated a more stringent water quality standard for the State or Tribe that is in effect[, i]n which case the EPA promulgated water quality standard is the applicable water quality standard for purposes of the Act until EPA withdraws the Federal water quality standard.² (40 C.F.R. 131.21(c).)

¹ The term "applicable waters of that State" modifies the term "navigable waters", which is defined as "the waters of the United States" in CWA section 502(7). (33 U.S.C. § 1362(7).) The term "waters of the United States" is further defined in 40 CFR section 122.2. Historically, U.S. waters were interpreted quite expansively, and it was not an unfair generalization to refer to them as including most surface waters. In *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers* (2001) 531 U.S. 159, 121 S.Ct. 675, however, the Supreme Court cast a question upon the statutory reach of the CWA, especially as it may relate to isolated, non-navigable, intrastate waters. Given this development, a more precise analysis of whether a given surface water is a water of the U.S., is warranted. The CWA does not apply to water quality standards adopted for "waters of the state" (Water Code § 13050(e)) unless they are also waters of the United States.

² Notably, EPA has stated that it would not object to an NPDES permit that implements a proposed, but as yet unapproved, more stringent standard, provided the NPDES permit assures compliance with the existing approved water quality standards as well. (65 F.R. at 24644.)

Under its own terms, the Alaska Rule only applies to new or revised water quality standards. The definition of "water quality standards", therefore, dictates the scope of the Alaska Rule.

The federal regulations define water quality standards in two locations. 40 Code of Federal Regulations sections 131.6(a), (c), and (d) require that water quality standards, in addition to specific supporting material, must include at least the following:

- Use designations (beneficial uses)
- Water quality criteria (water quality objectives)
- An antidegradation policy

To this list, 40 Code of Federal Regulations section 131.13 adds certain policies related to these standards:

States may, at their discretion, include in their State standards, policies generally affecting their application and implementation, such as mixing zones, low flows, and variances. Such policies are subject to EPA review and approval.

While section 131.13 of the federal regulations does not itself require prior approval of such policies, the regulation does state that such policies would be part of a state's standards. Accordingly, CWA section 303(c)(3) would apply, as would the Alaska Rule, to any such "policies" that "generally affect" the "application and implementation" of standards. (40 C.F.R. § 131.13.) Consistent with the above, EPA, Region IX, recently articulated with respect to the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (2000), that within the gambit of section 131.13 fall policies relating the application and implementation of priority pollutant criteria and objectives, mixing zones and dilution credits, compliance schedules, site-specific objectives, and exceptions (variances). (Letter from Alexis Strauss to Edward Anton, dtd. 5/1/01, pp. 2-3.)

B. TMDLS Are Not Policies As Referenced In Section 131.13

TMDLs are not policies, as referenced in section 131.13. This conclusion is drawn from the principal that while EPA has the authority to define the term "water quality standards," and to include certain types of policies in that definition, EPA's regulations implement the CWA and thus cannot be read in a manner inconsistent with the CWA itself. If a TMDL were deemed a policy under section 131.13, an irreconcilable conflict would exist between CWA sections 303(c)(3) and 303(d)(2). The former statute would require the TMDL to be approved within 60 days (before it could be effective) or disapproved within 90 days. The latter statute, however, requires the TMDL to be approved or disapproved within 30 days:

Each State shall submit to the Administrator. . .for his approval the. . .loads established under [section 303(d)(1)]. The Administrator shall either approve or

disapprove such . . . load not later than thirty days after the date of submission. If the Administrator approves such . . . load, such State shall incorporate [it] into its current [water quality control plan]. If the Administrator disapproves such . . . load, he shall not later than thirty days after the date of such disapproval . . . establish such loads for such waters as he determines necessary to implement the [applicable water quality standards] and the State shall incorporate them into its current [water quality control plan]. (33 U.S.C. § 1313(d)(2).)

Since the legislature enacted a separate approval process for TMDLs in section 303(d)(2), EPA's regulations cannot be read to require that TMDLs be approved under the conflicting provisions of section 303(c)(3). Plainly the regulations cannot regard entire TMDLs as policies subject to section 131.13. The Legislature thus did not intend TMDLs to be deemed water quality standards, and EPA's regulations at section 131.13 cannot be interpreted to the contrary.

This same reasoning would prevent dissecting a TMDL's primary elements and deeming one or more of them to individually be standards. A TMDL in its base form is the total load, load (and waste load) allocations, and the margin of safety. Creation of these parts of the TMDL, and EPA's approval authority, emanate from section 303(d)(2), not from section 303(c)(3).

Finally, neither can a TMDL's implementation plan be deemed a water quality standard under 40 Code of Federal Regulations section 131.13. Section 131.13 regards as water quality standards "policies generally affecting" water quality standards' "application and implementation." (40 C.F.R. 131.13.) A TMDL implementation plan, however, does not so qualify, for at least three reasons. First, the implementation plan is not a policy. It is a plan or a program. Second, the implementation plan does not "generally affect" the application or implementation of water quality standards, as do policies relating to mixing zones, low flows, or variances. (See 40 C.F.R. 131.13.) To the contrary, a TMDL implementation plan "specifically affects" the implementation of specific standards in specific water segments. Finally, section 131.13 requires for the policy to be deemed a water quality standard, that the state include the policy as part of its state standards: "States may . . . include in their State standards." (*Id.* (emphasis added).) The TMDL implementation plan, however, is not adopted in as part of California's state standards but as part of its TMDL. Whatever federal law may ultimately require TMDLs to include the implementation plan is a function of California law attendant with the responsibilities imposed by CWA section 303(d). (See Wat. C § 13050(j)(3); Memorandum from William R. Attwater, Chief Counsel, to Gerard Thibeault, dtd. 3/1/99.) The plan is therefore not a part of California's water quality standards (section 303(c)), but a part of California's TMDLs (section 303(d).)³

³ Considerable consternation across the country continues to plague the federal TMDL program. Not the least of these debates revolves around EPA's legal authority to require implementation plans for TMDLs. The new TMDL rule had required an implementation plan to be submitted with each TMDL. (65 F.R. 43586, 43668 (7/13/2000).) However, EPA postponed implementation of that rule until at least April 30, 2003. (66 F.R. 53043, 53044)

C. Notwithstanding The Above, Any Part Of A TMDL That Adopts Or Revises A Water Quality Standard Requires Prior EPA Approval Under The Alaska Rule

Although entire TMDLs, their primary elements, and their implementation plans are not water quality standards, in some instances other parts of a California TMDL may be standards subject to section 303(c)(3), and thus the Alaska Rule. If a TMDL implementation plan adopts a site-specific water quality objective, revises a beneficial use, or creates a mixing zone policy, for instance, clearly any of these provisions would be standards, and require prior approval pursuant to the Alaska Rule.

Other parts of a TMDL, however, plainly are not standards. Of the other standard TMDL elements in California, most are not policies and most do not generally affect the application and implementation of standards. The problem statement, source analysis, and linkage analysis, for example, are analyses and do not implicate section 131.13. Nor, for that matter, does the numeric target. The numeric target is an implementation tool used to translate existing standards (objectives or beneficial uses) and measure progress toward attainment. The numeric target does not amend or create new objectives or uses. Pursuant to the Alaska Rule, EPA already approved the existing objectives or uses when the standard was adopted.

The key inquiry is whether the basin plan amendment adopts or modifies a beneficial use or water quality objective. Furthermore, if the amendment establishes a policy as a part of state standards, that generally affects the application and implementation of the standards, then it too, falls within the purview of the Alaska Rule. However, such policies must be distinguished from plans or programs to attain or implement specific standards in specific water bodies.

D. Lack Of Application Of The Alaska Rule Does Not Deprive EPA Its Authority And Responsibility To Review And Approve Other Matters That Are Not The Adoption Or Revision Of Standards

The fact that the Alaska Rule does not apply to most parts of most TMDLs does not imply that EPA lacks any reviewing authority. The Alaska Rule only respects prior approval by EPA. EPA approval of TMDLs is nonetheless required, but prior approval is not. California's TMDLs (except any parts that revise standards), are immediately valid upon approval under California law, and may be implemented immediately. If EPA disapproves a TMDL, section 303(d)(2) requires EPA, within 30 days, to "establish such loads for such waters as [are] necessary to implement the [applicable] water quality standards." (33 U.S.C. § 1313(d)(2).) The state would thereafter be required to adopt into its applicable basin plan whatever TMDL EPA had promulgated. (*Id.*; 40 C.F.R. 130.7(d)(2).) In this respect, the state's disapproved TMDL would not be *per se* invalid. It would only be invalid to the extent it was superseded by EPA's TMDL.

(10/18/2001).) In any event, EPA also apparently considers the implementation plan to be part of a TMDL and not part of a water quality standard.

(33 U.S.C. § 1370.) The remainder of the TMDL's requirements would continue to have full force of law, under California's Porter-Cologne authority.

CONCLUSION

Under the Alaska Rule, EPA must approve water quality standards for waters of the United States before they are effective. While water quality standards can include certain policies generally affecting standards application and implementation, such policies are but a subset of potential state actions relating to standards. While each TMDL must be submitted to EPA for approval, unlike the standards section (CWA section 303(c)(3)) CWA section 303(d)(2) does not require approval of TMDLs as a condition precedent to enforceability. Accordingly, every part of a TMDL, except adoption of a new or revised water quality standard, is enforceable under California law, immediately upon promulgation under California law.

While some TMDLs presented to the State Board have contained a condition establishing the effective date of the TMDL to be the date upon which it is approved by EPA, such a condition is not required as a matter of state or federal law, and should be used only when it is actually the desire of the Regional Water Quality Control Board to do.

Should you have any questions about this memorandum, please contact Staff Counsel Michael J. Levy at (916) 341-5193.

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